

No. 10443

United States 14
Circuit Court of Appeals
For the Ninth Circuit.

W. S. SWANK,

Appellant,

vs.

J. H. PATTERSON, E. J. GOTTHELF,
CHARLES S. SMITH, CHARLES C. BRAD-
BURY and WILLIAM G. SCHULTZ,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Arizona

FILED

JUL - 1 1943

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Phoenix, Arizona,

Attorney for Appellant.

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Ellis Building,
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Assistant Attorney General,
Capitol Building,
Phoenix, Arizona,

Attorneys for Appellees. [3*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the United States District Court in and for the
District of Arizona.

No. Civ-359 Phx.

W. S. SWANK,

Plaintiff,

vs.

J. H. PATTERSON, E. J. GOTTHELF,
CHARLES S. SMITH, CHARLES C. BRAD-
BURY, and WILLIAM G. SCHULTZ,
Defendants.

COMPLAINT

Comes now the plaintiff and for cause of action
against the above named defendants, alleges:

I.

That the plaintiff is now and for many years
last past, has been a bona fide resident and citizen
and practitioner of the healing arts in the State
of Arizona; and that plaintiff is the owner of a
diploma from the American Academy of Medicine
and Surgery, issued June 1, 1927, a copy of which
is attached and marked "Exhibit A" and is made
a part of this complaint. That the said American
Academy of Medicine and Surgery is located at
Washington, D. C. and is incorporated as a Medi-
cal College under the laws enacted by the United
States Congress for the District of Columbia.

II.

That this Court has jurisdiction of this case be-

cause the constitution and laws of the United States are involved.

III.

That the Legislature of the State of Arizona, in 1917, enacted the following statutes regarding the practice of medicine:

“Article 9. Medicine and Surgery. [5]

S.2554. Board of Medical Examiners; appointment; terms; meetings; salary. The governor shall appoint a Board of Medical Examiners consisting of five members, each of whom shall have resided in Arizona for a period of three years next before his appointment, and be a licensed graduate practitioner. Two members shall be from the allopathic, one from the homeopathic, one from the eclectic and one from the osteopathic schools of medicine. Vacancies occurring in the representation of said professions respectively, shall be filled from said profession. The appointment of each member shall be for a term of two years. No professor, instructor, or other person in any manner connected with, or financially interested in, any college or school of medicine, surgery or osteopathy shall be appointed. Said board shall elect from its number a president, vice president, second vice president, secretary and treasurer, who shall hold their respective positions during the pleasure of said board. Regular meetings shall be held at its office at the state capitol on the first Tuesday of January, April, July and October of each year. Said board may adopt rules and any member may administer oaths and take evidence in any matter cogniza-

ble by the board. The board shall fix the salary of the secretary not to exceed twelve hundred dollars per year and the compensation of the other members, not to exceed ten dollars for each day of actual service, and the members of the board shall receive their actual expenses when on the business of the board. (S S 1-2-3-4-5. 13 Ch. 17, L'13 and S.S.; 4733- 4-5-6-7, 4745, R.S. '13; 4734, Am. 73, Ch. 35, L. '22 cons. & rev.) S. 2555. Practice of medicine defined. A person shall be regarded as practicing medicine who shall, by any indication, or [6] statement, claim his ability or willingness to, or does diagnose, or prognosticate, any human ills, or claims his ability or willingness to, or does prescribe or administer any medicine, treatment or practice; or performs any operation, or manipulation, or application for compensation therefor, except it be in usual practice of dentistry, midwifery, or pharmacy, or in the usual business of opticians, or of vendors of dental or surgical instrument, apparatus or appliances. Practicing medicine shall include this practice of osteopathy. (S. 6, id. :4738, R.S. '13 rev.) S. 2566. Certificates to practice; requirements of applicants; examination; reciprocity certificates; fees. Three forms of certificates shall be issued by said board, under the seal thereof and signed by the president and secretary; first a certificate authorizing the holder thereof to practice medicine and surgery; second, authorizing the practice of osteopathy; third, a reciprocity certificate. Any of these certificates on being recorded in the office of the county recorder, shall constitute

the holder thereof a duly licensed practitioner in accordance with the provisions of his certificate. To procure a certificate to practice medicine and surgery, the applicant shall file with said board, at least two weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting such diploma, not less than those prescribed by the Association of American Medical Colleges for that year, or satisfactory evidence of having possessed such diploma; and he must also file a verified application, upon blanks furnished by the board, stating [7] that he is the lawful holder thereof and that the same was procured without fraud or misrepresentation.

Applicants for a certificate to practice osteopathy shall be subject to the same regulations, except that instead of the diploma from a school of medicine, they shall file a diploma, from a legally chartered college of osteopathy, having a course of instruction of at least twenty months, requiring actual attendance of three years of nine months each, including the studies examined upon for his license. Applicants for a certificate to practice any other system or mode of treatment shall be subject to the above regulations, except that instead of the diploma referred to, they shall file a diploma from a legally chartered college of the system or mode of treatment which the applicant claims or intends to follow.

The examination shall be conducted in the Eng-

lish language, shall be practical in character and in whole or in part, in writing, on the following subjects: Anatomy, histology, gynocology, pathology, bacteriology, chemistry and toxicology, physiology, obstetrics, general diagnosis, hygiene. Examination in each subject shall consist of not less than ten questions, answers to which shall be marked upon a scale of zero to ten. An applicant must obtain not less than a general average of seventy-five per cent, and not less than sixty per cent in any one subject; provided, that applicant who can show five years of reputable practice shall be granted a credit of five percent upon the general average, and five percent additional for each subsequent ten years of such practice, but must receive not less than fifty percent upon any one subject. The examination papers shall form part of the records of the [8] board and shall be kept on file by the secretary for one year after such examination. In the examinations the applicants shall be known and designated by numbers only, and the names attached to the numbers shall be kept secret until after the board has finally passed upon the applications. The Secretary of the board shall not participate as an examiner in the examination.

Any applicant for a certificate to practice medicine and surgery shall be granted a reciprocity certificate without such examination, if he shall file with said board the testimonials, diploma, and application, and shall file a certificate or license to practice medicine or surgery issued upon and after examination to said applicant by any state or for-

eign country where the requirements are at least equal to those in force in Arizona at that time, or by the national board of medical examiners, and which certificate shall be accompanied by a further certificate, issued by the medical officer or board issuing the certificate or license first named, or by a certificate issued by the medical officer or board of the jurisdiction wherein the applicant last practiced, that the applicant at the time of the issuance of said last named certificate was an ethical practitioner and has practiced medicine and surgery for at least three years immediately prior to the issuance of said certificate; an applicant for a reciprocity certificate or license, who shall otherwise comply with the provision hereof, and who shall file with said board evidence of an honorable discharge from the medical corps of the army or navy of the United States, shall not be required to furnish character testimonials or file the certificate of ethical practice for said three years. The fee [9] for reciprocity certificates shall be one hundred dollars, if the credentials are held insufficient, seventy-five dollars shall be returned.

The board may, whenever the services of an applicant are needed as an emergency in any community, grant to a graduate of any recognized medical college, a temporary permit to practice medicine and surgery in said community, such temporary permit to be valid only until the next regular meeting of the board. The fee for such temporary permit shall be twenty-five dollars. (S. 7, id.; 4739, R.S. '13 am., Ch. 66 L'17, Ch. 119, L '21 rev.)

See 20 Cal. Jur. 1056; 21 R.C.L. 352.

That thereafter the Legislature of the State of Arizona in 1935, passed what is commonly called the Basic Science Law to substitute the laws of 1917 which reads as follows:

67-1101 Board of Medical Examiners—Appointment—Term—Meetings—Salary. The governor shall appoint a board of medical examiners consisting of five (5) members, each of whom shall have resided in Arizona for a period of three (3) years next before his appointment, and be a licensed graduate practitioner. Four (4) members shall be graduates of schools recognized by the American Association of Medical Colleges, and one (1) shall be a graduate of a recognized school of osteopathy. Vacancies occurring in the representation of said profession respectively, shall be filled from said profession. The first appointee shall serve for two (2) years, the second for three (3) years and the third for four (4) years, the fourth for five (5) years and the fifth for six (6) years. Thereafter each member appointed shall be for a term of six (6) years. No professor, instructor or other person in any manner, with, or financially interested in, any college or school of medicine [10] surgery or osteopathy shall be appointed.

The board shall elect from among its members a president, vice-president, second vice-president, secretary and treasurer, who shall hold their respective positions during the pleasure of the board. Regular meetings shall be held at the office of the board at the state capitol on the first Tuesday of

January, April, July and October of each year. The board may adopt rules and any member may administer oaths and take evidence in any matter cognizable by the board. The board shall fix the salary of the secretary, not to exceed twelve hundred (\$1200.00) dollars per year, and the compensation of the other members not to exceed ten dollars (\$10.00) for each day of actual service, and the members of the board shall receive their actual expenses when on the business of the board. (R.S. 1913, S S 4733-4737, 4745; Laws 1922, Ch. 35, SS 73, p. 174, cons. & rev. RC 1928, SS 2554; Laws 1935, Ch. 99, ss 1. p. 409).

67-1102 Practice of medicine defined. A person shall be regarded as practicing medicine who shall, by any indication, or statement, claim his ability or willingness to, or does diagnosticate or prognosticate, any human ills, or claims his ability or willingness to, or does prescribe or administer any medicine, treatment or practice, or performs any operation, or manipulation, or application for compensation therefor, except it be in usual business of opticians, or of vendors of dental or surgical instruments, apparatus and appliances. Practicing medicine shall include the practice of osteopathy. (R.S. 1913, ss 4783; Rev. R. C. 1928, ss 2555).

67-1103. Certificates to practice—Requirements of applicants—Examination—Reciprocity certificates—Fees. Three (3) forms of certificates shall be issued by said board, under [11] the seal thereof and signed by the president and secretary; first, a certificate authorizing the holder thereof to practice

medicine and surgery; second, authorizing the practice of osteopathy; third, a reciprocity certificate. Any of these certificates, on being recorded in the office of the county recorder, shall constitute the holder thereof a duly licensed practitioner in accordance with the provisions of his certificate. To procure a certificate to practice medicine and surgery, the applicant shall file with said board, at least two (2) weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting such diploma, not less than those prescribed by the Association of American Medical Colleges for that year, or satisfactory evidence of having possessed such diploma, and he must also file a verified application, upon blanks furnished by the board, stating that he is the person named in such diploma, that he is the lawful holder thereof, and that the same was procured in the regular course of instruction and examination without fraud or misrepresentation.

Applicants for a certificate to practice osteopathy shall be subject to the same regulations, except that instead of the diploma from a school of medicine, they shall file a diploma from a legally chartered college of osteopathy, having a course of instruction of at least twenty (20) months, requiring actual attendance of three (3) years of nine (9) months each, and including the studies examined upon for his license. Applicants for a certificate to

practice any other system or mode of treatment shall be subject to the above [12] regulations, except that instead of the diplomas referred to, they shall file a diploma from a legally chartered college of the system or mode of treatment which the applicant claims or intends to follow.

The examination shall be conducted in the English language, shall be practical in character and in whole or in part, in writing, on the following subjects: Anatomy, histology, gynecology, pathology, bacteriology, chemistry and toxicology, physiology, obstetrics, general diagnosis, hygiene. Examination in each subject, shall consist of not less than ten (10) questions, answers to which shall be marked upon a scale of zero to ten. An applicant must obtain not less than a general average of seventy-five (75) per cent, and not less than sixty (60) per cent in any one (1) subject; provided that applicants who can show five (5) years of reputable practice shall be granted a credit of five (5) per cent upon the general average, and five (5) per cent additional for each subsequent ten (10) years of such practice, but must receive not less than fifty (50) per cent upon any one (1) subject. The examination papers shall form a part of the records of the board and shall be kept on file by the secretary for one (1) year after such examination. In the examinations the applicants shall be known and designated by numbers only, and the names attached to the numbers shall be kept secret until after the board has finally passed upon the applications. The secretary of the board shall not participate as an examiner in the examination.

Any applicant for a certificate to practice medicine and surgery shall be granted a reciprocity certificate without such examination if he shall file with said board the testimonials, diploma, and application; and shall file a certificate or [13] license to practice medicine or surgery issued upon and after examination to said applicant by any other state or foreign country where the requirements are at least equal to those in force in Arizona, at that time, or by the national board of medical examiners, and which certificate shall be accompanied by a further certificate, issued by the medical officer or board issuing the certificate or license first named, or by a certificate issued by the medical officer or board of the jurisdiction wherein the applicant last practiced, that the applicant at the time of the issuance of said last named certificate was an ethical practitioner and has practiced medicine and surgery for at least three (3) years immediately prior to the issuance of said certificate; an applicant for a reciprocity certificate or license who shall otherwise comply with the provisions hereof, and who shall file with said board evidence of an honorable discharge from the medical corps of the army or navy of the United States, shall not be required to furnish character testimonials or file the certificate of ethical practice for said three (3) years. The fee for reciprocity certificates shall be one hundred dollars (\$100.00), if the credentials are held insufficient seventy-five dollars (\$75.00) shall be returned.

The board may, whenever the services of an ap-

plicant are needed as an emergency in any community, grant to a graduate of any recognized medical college, a temporary permit to be valid only until the next regular meeting of the board. The fee for such temporary permit shall be twenty-five dollars (\$25.00). (R. S. 1913 ss 4739; Laws 1917, Ch. 66 ss 1, p. 98; 'L 1921, Ch. 119, ss 1 p. 264. Rev. R. C. 1928 ss 2556.)

67-11-4. Fee—Records. Each applicant, on making application [14] shall pay a fee of twenty-five (\$25.00) dollars, fifteen (\$15.00) dollars of which shall be returned if the applicant's credentials are insufficient, or he does not desire to take the examination. The board shall keep a record of all of its proceedings, a register of all applicants and the result of each examination. (R. S. 1913, ss 4740, 4741; Cons. & Rev. R. C. 1928 ss 2557.)

IV.

That the defendants, E. J. Cotthelf, Charles C. Bradbury, Charles S. Smith and William G. Schultz, are the members of the Board of Medical Examiners, operating under the Basic Science Laws of 1935.

That J. H. Patterson has, at all times, been the acting Secretary of the said Board of Medical Examiners.

V.

That the defendants and each of them have, for a long period of time, since 1933, repeatedly refused to give the plaintiff an examination for a

license to practice medicine, though often requested.

VI.

Plaintiff alleges that said acts of the Legislature provide that any one, to qualify to take the examination to practice medicine and surgery which reads as follows:

“To procure a certificate to practice medicine and surgery, the applicant shall file with the board, at least two (2) weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting of such diploma, not less than those prescribed by the Association of American Medical Colleges for that year.” [15]

Plaintiff alleges that the Association of American Medical Colleges is fostered by the American Medical Association, which associations, the Association of American Medical Colleges, and the American Medical Association, is a monopoly, in violation of Section 2, Title 15, of the United States Code, and is in violation of Section 74-101 of the Laws of the State of Arizona. That both Section 2, Title 15 of the United States Code, and Section 74-101 of the Laws of the State of Arizona, prohibit monopolies.

VII.

Plaintiff alleges that, in addition to denying this plaintiff the right to take the examination as a doc-

tor of medicine, defendants and each of them have caused the plaintiff to be arrested and tried in the courts of Maricopa County, Arizona, on a felony charge of practicing medicine without a license, although plaintiff was only treating patients as a naturopathic physician and has a license to practice the art of healing as a Naturopath under the laws of the state of Arizona.

Plaintiff alleges that he was acquitted of said charge of practicing medicine without a license, in the courts of Maricopa County, Arizona; that the defendants, and each of them, have caused numerous damage suits to be filed in the courts of Maricopa County, for malpractice, which suits have been decided in favor of the plaintiff.

VIII.

Plaintiff alleges that the acts complained of against the defendants and each of them, are acts denying this plaintiff the rights guaranteed to him under the 14th Amendment of the Constitution of the United States, which read as follows: [16]

“Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

IX.

Plaintiff alleges that the acts complained of against the defendants and each of them, are acts constituting compulsory denial to plaintiff of the rights guaranteed to him under the 14th Amendment of the Constitution of the United States of America, and constituting a violation of Section 51, Title 18 of the United States Code, which reads as follows:

“Section 51. (Criminal Code, Section 19), Conspiracy to injure persons in exercise of civil rights. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment or any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than \$5,000.00 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit or trust created by the Constitution or laws of the United States. (R.S. ss 5508; Mar. 4, 1909, C. 321; ss 19, 35 Stat. 1092.)”[17]

X.

Plaintiff alleges that he has been damaged by the acts of the defendants and each of them in the amount of Fifty Thousand (\$50,000.00) Dollars.

Wherefore, Plaintiff prays judgment against the defendants and each of them in the amount of Fifty Thousand (\$50,000.00) Dollars, and for such other relief as the Court may deem just and proper.

C. H. RICHESON

Attorney for Plaintiff,

27 E. Monroe Street

Phone 3-9878.

(Duly Verified.) [18]

American Academy of Medicine and Surgery

INCORPORATED
UNDER



AN ACT OF
CONGRESS

TO ALL TO WHOM THESE PRESENTS SHALL COME

Greeting

Be it known that

W. S. Stark

Having completed in a satisfactory manner the course of instruction and passed the required examinations prescribed by this Academy, is entitled to this

DIPLOMA

and we hereby confer upon him the degree of

Doctor of Medicine

By virtue of authority vested in this American Academy of Medicine and Surgery by Congressional Act.
In Witness Whereof we have affixed our signatures and the corporate seal of the American Academy of Medicine and Surgery at Washington, District of Columbia, this first day of June 1927

McCaskine Ingram, M.D., M.A.
PRESIDENT

Chas. F. Richel M.S., Litt. D.
VICE PRESIDENT



Richard B. Schlemmer, M.D., M.D.
DEAN

John Parsons Field, M.D., M.D.
SECRETARY

ENDORSED: FILED DEC 26 1942
EDWARD W. SCRUGGS, CLERK
United States District Court
for the District of Arizona
By Gwen. Roby, Deputy Clerk.

In the United States District Court
for the District of Arizona

October, 1942 Term

At Phoenix

Minute Entry of
Monday, January 25, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

ORDER EXTENDING TIME TO ANSWER

On motion of Cecil A. Edwards, Esquire,

It Is Ordered that the time of all the defendants
herein within which to answer be and it is extended
until twenty days from this date. [21]

[Title of District Court and Cause.]

APPLICATION TO SET ORDER ASIDE EX-
TENDING TIME TO ANSWER, AND MO-
TION FOR DEFAULT

State of Arizona

County of Maricopa—ss.

Comes now, W. S. Swank, the plaintiff in the
above entitled cause, and, first being duly sworn,
deposes and says:

1. That a complaint and summons was filed in
the above-entitled cause in this court on December
26, 1942; that a copy of the complaint herein, to-

gether with a copy of the summons issued thereon, was served in Phoenix, Arizona, on the defendants J. H. Patterson, Charles C. Bradbury on January 4, 1943; that said copies of complaint and summons were served on defendant Charles S. Smith on January 7, 1943 and that copies thereof were served on defendant E. J. Gotthelf on January 8, 1943, all in Maricopa County, Arizona.

2. That said cause of action is one for damages against the defendants in their individual capacities and not as State officials, and to that effect against each and all of them. [22]

3. That on January 25, 1943, Cecil A. Edwards, acting as a Deputy Attorney General of the State of Arizona, appeared before this Honorable Court and obtained therefrom a purported order extending the time for said defendants to answer, and that this Court, pursuant thereto, did enter an order extending the defendants' time for answer to twenty days from January 25, 1943.

4. That said Cecil A. Edwards, so acting as aforesaid, as Deputy Attorney General, did appear in this cause as above stated, in violation of Sec. 4-503 of the Arizona Code Annotated, 1939, which provides as follows:

“The Attorney General shall be the legal adviser of all departments of the state and shall give such legal service as such departments may require. . . The Attorney General may, when the business of the state requires, employ assistants.”

That because of said circumstances, the said At-

torney General, acting through his deputy, Cecil A. Edwards, had no right as such official to act in behalf of private individuals in a case brought by an individual; consequently, the purported appearance was unlawful and therefore null and void, which is further evident from the fact that subsequent to said purported appearance, the Hon. Walter J. Thalheimer, a member of the State Senate, has introduced therein a bill known as Senate Bill 61, for the manifest purpose of legalizing such acts as were performed herein by the said Cecil A. Edwards. That said bill provides, in addition to the present statute, that "whenever a state officer or any member of any board or commission of the State, has sued for damages for an act done by such officer or member in connection with the performance of the duties of his office, the Attorney General may represent such officer or member in any such action." [23]

That said bill has not become a law, consequently these provisions do not extend to the circumstances of this case.

[Signed] W. S. SWANK.

Before me personally appeared W. S. Swank, known to me to be the person whose name is subscribed to the foregoing instrument, and stated that he had read the foregoing affidavit and knows the contents of same, and that the same is true of his own knowledge.

[Seal] (Sgd) A. O. KANE

Notary Public.

My commission expires April 10, 1944.

Wherefore, plaintiff prays that the order extending the time for the defendants to answer as above stated, be revoked and stricken from the records, and that plaintiff have default against said served defendants, as prayed in his complaint.

[Signed]

C. H. RICHESON

Attorney for Plaintiff.

NOTICE OF HEARING

To the above named defendants: You are hereby notified that plaintiff desires to argue the within motion to the Court on Monday, February 8, 1943 at ten o'clock a. m., pursuant to the rules of said court.

C. H. RICHESON

Attorney for plaintiff.

[Endorsed]: Filed Jan. 29, 1943. [24]

[Title of District Court and Cause.]

CORRECTED APPLICATION TO SET ORDER ASIDE EXTENDING TIME TO ANSWER, AND MOTION FOR DEFAULT

State of Arizona,
County of Maricopa—ss.

Comes now W. S. Swank, the plaintiff in the above-entitled cause, and, first being duly sworn, deposes and says:

I.

That a complaint and summons was filed in the above-entitled cause in this court on December 26,

1942; that a copy of the complaint herein, together with a copy of the summons issued thereon, was served in Phoenix, Arizona, on the defendants J. H. Patterson, Charles C. Bradbury on January 4, 1943; that said copies of complaint and summons were served on defendant Charles S. Smith on January 7, 1943, and that copies thereof were served on defendant E. J. Gotthelf on January 8, 1943, all in Arizona.

II.

That said cause of action is one for damages against the defendants in their individual capacities and not as State officials, and to that effect against each and all of them.

III.

That on January 25, 1943, Cecil A. Edwards, acting as a Deputy Attorney General of the State of Arizona, appeared before this honorable Court and obtained therefrom a purported order extending the time for said defendants to answer, and that this Court, pursuant thereto, did enter an order extending the defendants' time for answer to twenty days from January 25, 1943. [25]

IV.

That said Cecil A. Edwards, so acting as aforesaid, as Deputy Attorney General, did appear in this cause as above stated, in violation of Sec. 4-503 of the Arizona Code Annotated, 1939, which provides as follows:

“The Attorney General shall be the legal adviser of all departments of the state, and shall

give such legal service as such departments may require . . . The Attorney General may, when the business of the state requires, employ assistants.”

That because of said circumstances, the said Attorney General, acting through his said deputy, Cecil A. Edwards, had no right as such official to act in behalf of private individuals in a case brought against individuals; consequently, the purported appearance was unlawful and therefore null and void, which is further evident from the fact that subsequent to said purported appearance, the Hon. Walter J. Thalheimer, a member of the State Senate, has introduced therein a bill known as Senate Bill 61, for the manifest purpose of legalizing such acts as were performed herein by the said Cecil A. Edwards. That said bill provides, in addition to the present statute, that “whenever a state officer or any member of any board or commission of the State, has been sued for damages for an act done by such officer or member in connection with the performance of the duties of his office, the Attorney General may represent such officer or member in any such action.”

That said bill has not become a law, consequently these provisions do not extend to the circumstances of this case.

W. S. SWANK

Before me personally appeared W. S. Swank, known to me to be the person whose name is subscribed to the foregoing instrument, and stated

that he had read the foregoing affidavit and knows the contents of same, and that the same is true of his own knowledge.

[Seal]

HORTENSE ANDERSON

Notary Public.

My commission expires 8-24-1943. [26]

Wherefore, plaintiff prays that the order extending the time for the defendants to answer as above stated, be revoked and stricken from the records, and that plaintiff have default against said served defendants, as prayed in his complaint.

C. H. RICHESON

Atty for Plaintiff

NOTICE OF HEARING

To the above named defendants:

You are hereby notified that plaintiff desires to argue the within motion to the court on Monday, February 8, 1943 at ten o'clock a. m. pursuant to the rules of said court.

C. H. RICHESON

Attorney for Plaintiff

27 E. Monroe Street

Phoenix, Arizona

Phone 3-9878

[Endorsed]: Filed Feb. 2, 1943. [27]

In the United States District Court
For the District of Arizona

October 1942 Term

At Phoenix

Minute Entry of
Monday, February 8, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

ORDER DENYING PLAINTIFF'S COR-
RECTED APPLICATION TO SET ORDER
ASIDE EXTENDING TIME TO ANSWER

Plaintiff's Corrected Application to Set Order
Aside Extending Time to Answer and Motion for
Default come on regularly for hearing this day.
C. H. Richeson, Esquire, appears as counsel for the
plaintiff. Cecil A. Edwards, Esquire, appears as
counsel for the defendants. Argument is now had
by respective counsel, and

It Is Ordered that said Motion be and it is denied.

[28]

[Title of District Court and Cause.]

MOTION TO DISMISS

Come now the defendants, J. H. Patterson, E. J.
Gotthelf, Charles S. Smith and Charles C. Brad-
bury, by their attorneys, and move that the Court
dismiss plaintiff's complaint on the grounds and
for the reasons hereinafter stated.

I.

The Court has no jurisdiction over the subject matter of this action.

II.

That the complaint does not state a claim upon which relief can be granted.

T. E. SCARBOROUGH

C. A. EDWARDS

Assistant Attorney General
Attorneys for all defendants
other than William G. Schultz

POINTS AND AUTHORITIES IN SUPPORT
OF FOREGOING MOTION

There is no allegation of facts which will show or tend to show a conspiracy within the purview of Title 18, Section 51, United States Code.

There is not sufficient allegation to show or tend to show that plaintiff was entitled to be given an examination for a license to practice medicine. Rule 12 (b).

[Endorsed]: Filed Feb. 8, 1943 [29]

[Title of District Court and Cause.]

APPLICATION FOR ORDER REMOVING
CECIL A. EDWARDS, ASSISTANT ATTOR-
NEY GENERAL, AS COUNSEL FOR DE-
FENDANTS

Comes now, W. S. Swank, plaintiff in the above entitled cause and moves the Court to strike the name of Cecil A. Edwards, Assistant Attorney General, as counsel for the defendants herein, because this is an action for damages against the defendants, and each of them, privately; because the State Law prohibits the Attorney General's office from practicing law privately; that this case is for damages as a result of the defendants denying plaintiff his constitutional rights, in which the defendants are alleged to have violated Section 2, Article 15, of the United States Code, and Section 74-101 of the Code of the State of Arizona; that the defendants have violated Section 51, Criminal Code, Section 19, of the United States Statutes, in denying the plaintiff his rights guaranteed under the Fourteenth Amendment of the Constitution of the United States;

That the Attorney General is not only prohibited from practicing law privately, and in appearing herein is appearing for the defendants accused of violating the law, therefore the State has no interest in the case and the Attorney General has no right to appear on behalf of these defendants *amicus curiae*.

Wherefore, Plaintiff moves that the name of Cecil A. Edwards, Assistant Attorney General, be stricken in this case.

Respectfully submitted,

C. H. RICHESON

Attorney for Plaintiff.

27 East Monroe Street

Phoenix, Arizona

Phone 3-9878 [30]

[Endorsed]: Filed Feb 10 1943 [31]

In the United States District Court for the
District of Arizona

October 1942 Term

At Phoenix

Minute Entry of March 20, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding

[Title of Cause.]

ORDER GRANTING PLAINTIFF LEAVE
TO FILE SECOND AMENDED COMPLAINT

On motion of C. H. Richeson, Esquire, counsel
for the plaintiff,

It Is Ordered that the plaintiff be granted leave
to file Second Amended Complaint herein. [32]

[Title of District Court and Cause.]

SECOND AMENDED COMPLAINT

Comes now the plaintiff and by his second amended complaint against the above defendants, alleges:

That this is an action of a civil nature in law for damages over which the District Courts of the United States are given original jurisdiction.

The controversy; violation by the defendants of the Fourteenth Amendment to the United States Constitution; violation of Section 2, Article 15 of the Laws of the United States, known as the anti-trust law; all in violation of plaintiff's rights and benefits, and to his damages in excess of Three Thousand Dollars (\$3,000.00).

I.

That the plaintiff is now, and for many years last past has been a citizen of the United States and a bona fide resident of Maricopa County, State of Arizona, within the district of Arizona; that during all of said years he has been engaged as a practitioner of the healing arts, and is the lawful holder of a diploma issued to him by The American Academy of Medicine and Surgery on June First, 1927, a true copy of which is hereto attached, marked Exhibit "A" and by reference made a part hereof.

That the said The American Academy of Medicine and Surgery was then located at the City of Washington, D. C., was a [33] legally chartered

school and college of medicine, and was incorporated by an Act of the Congress of the United States.

II.

That the Legislature of the State of Arizona, in 1917, enacted Article 9, Sections 2554, 2555, 2556 entitled "Medicine and Surgery", namely:

"Sec. 2554. Board of medical examiners; appointment; terms; meetings; salary. The governor shall appoint a board of medical examiners consisting of five members, each of whom shall have resided in Arizona for a period of three years next before his appointment, and be a licensed graduate practitioner. Two members shall be from the allopathic, one from the homeopathic, one from the eclectic and one from the osteopathic schools of medicine. Vacancies occurring in the representation of said professions respectively, shall be filled from said profession. The appointment of each member shall be for a term of two years. No professor, instructor, or other person in any manner connected with, or financially interested in, any college or school of medicine, surgery or osteopathy shall be appointed. Said board shall elect from its number a president, vice-president, second vice-president, secretary and treasurer, who shall hold their respective positions during the pleasure of said board. Regular meetings shall be held at its office at the State Capitol on the first Tuesday of January, April, July and October of each year. Said board may adopt rules and any member may administer oaths and take evidence in any matter

cognizable by the board. The board shall fix the salary of the secretary not to exceed twelve hundred dollars per year and the compensation of the other members, not to exceed ten dollars for each day of actual service, and the members of the board shall receive their actual expenses when on the business of the board”.

“Sec. 2555. Practice of medicine defined. A person shall be regarded as practicing medicine who shall, by any indication or statement, claim his ability or willingness to, or does diagnose, or prognosticate, any human ills; or claims his ability or willingness to, or does prescribe or administer any medicine, treatment or practice; or perform any operation, or manipulation, or application for compensation therefor, except it be in usual practice of dentistry, midwifery, or pharmacy, or in the usual business of opticians, or of vendors of dental or surgical instruments, apparatus and appliances. Practicing medicine shall include the practice of osteopathy.”

“Sec. 2556. Certificates to practice; requirements of applicants; examination; reciprocity certificates; fees. Three forms of certificates shall be issued by said board, under the seal thereof and signed by the president and secretary; first, a certificate authorizing the holder thereof to practice medicine and surgery; second, authorizing the practice of osteopathy; third, a reciprocity certificate. Any of these certificates, on being recorded in the office of the county recorder, shall constitute the holder thereof a duly licensed practitioner in accordance with the provi-

sions of his certificate. To procure a certificate to practice medicine and surgery, the applicant shall file with said board, at least two weeks prior to a [34] regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting such diploma, not less than those prescribed by the Association of American Medical colleges for that year, or satisfactory evidence of having possessed such diploma; and he must also file a verified application, upon blanks furnished by the board, stating that he is the person named in such diploma, that he is the lawful holder thereof, and that the same was procured in the regular course of instruction and examination without fraud or misrepresentation.

Applicants for a certificate to practice osteopathy shall be subject to the same regulation, except that instead of the diploma from a school of medicine, they shall file a diploma from a legally chartered college of osteopathy, having a course of instruction of at least twenty months, requiring actual attendance of three years of nine months each, and including the studies examined upon for his license. Applicants for a certificate to practice any other system or mode of treatment shall be subject to the above regulations, except that instead of the diploma referred to, they shall file a diploma from a legally chartered college of the system or mode of treatment which the applicant claims or intends to follow.

The examination shall be conducted in the English language, shall be practical in character and in whole or in part, in writing, on the following subjects: Anatomy, histology, gynecology, pathology, bacteriology, chemistry and toxicology, physiology, obstetrics, general diagnosis, hygiene. Examination in each subject shall consist of not less than ten questions, answers to which shall be marked upon a scale of zero to ten. An applicant must obtain not less than a general average of seventy-five per cent, and not less than sixty per cent in any one subject; provided, that applicant who can show five years of reputable practice shall be granted a credit of five per cent additional for each subsequent ten years of such practice, but must receive not less than fifty per cent upon any one subject. The examination papers shall form a part of the records of the board and shall be kept on file by the secretary for one year after such examination. In the examination, the applicants shall be known and designated by numbers only, and the names attached to the numbers shall be kept secret until after the board has finally passed upon the applications. The secretary of the board shall not participate as an examiner in the examination.

Any applicant for a certificate to practice medicine and surgery shall be granted a reciprocity certificate without such examination, if he shall file with said board the testimonials, diploma, and application; and shall file a certificate or license to practice medicine or surgery issued upon and after examination to said applicant by any state or for-

eign country where the requirements are at least equal to those in force in Arizona at that time, or by the national board of medical examiners, and which certificate shall be accompanied by a further certificate, issued by the medical officer or board issuing the certificate or license first named, or by a certificate issued by the medical officer or board of the jurisdiction wherein the applicant last practiced, that the applicant at the time of [35] the issuance of said last named certificate was an ethical practitioner and has practiced medicine and surgery for at least three years immediately prior to the issuance of said certificate; an applicant for a reciprocity certificate or license, who shall otherwise comply with the provisions hereof, and who shall file with said board evidence of an honorable discharge from the medical corps of the army or navy of the United States, shall not be required to furnish character testimonials or file the certificate of ethical practice for said three years. The fee for reciprocity certificate shall be one hundred dollars, if the credentials are held insufficient, seventy-five dollars shall be returned.

The board may, whenever the services of an applicant are needed as an emergency in any community, grant to a graduate of any recognized medical college, a temporary permit to practice medicine and surgery in said community, such temporary permit to be valid only until the next regular meeting of the board. The fee for such temporary permit shall be twenty-five dollars”.

III.

That, thereafter, the legislature of the state of Arizona, in 1936, enacted what is commonly called and known as the "Basic Science Law", supplanting the aforesaid laws of 1917, and being Sections 67-1101, 67-1102, 67-1103 and 67-1104, namely:

"67-1101. Board of Medical Examiners - Appointment - Term - Meetings - Salary. The governor shall appoint a board of medical examiners consisting of five (5) members, each of whom shall have resided in Arizona for a period of three (3) years next before his appointment, and be a licensed graduate practitioner. Four (4) members shall be graduates of medical schools recognized by the American Association of Medical Colleges, and one (1) shall be a graduate of a recognized school of osteopathy. Vacancies occurring in the representation of said professions respectively, shall be filled from said profession. The first appointee shall serve for two (2) years, the second for three (3) years and the third for four (4) years, the fourth (4) for five (5) years and the fifth for six (6) years. Thereafter each member appointed shall be for a term of six (6) years. No professor, instructor or other person in any manner connected with, or financially interested in, any college or school of medicine, surgery or osteopathy shall be appointed. The board shall elect from among its members a president, vice-president, second vice-president, secretary and treasurer, who shall hold their respective positions during the pleasure of the board. Regular meetings shall be held at the office of the board at

the state capitol on the first Tuesday of January, April, July and October of each year. The board may adopt rules and any member may administer oaths and take evidence in any matter cognizable by the board. The board shall fix the salary of the secretary, not to exceed twelve hundred (\$1200.00) dollars per year, and the compensation of the other members not to exceed Ten (\$10.00) dollars for each day of actual service, not exceeding fifty days in any one year, and the members of the board shall receive their actual expenses when on business of the board, not exceeding fifty (\$50.00) dollars in any one year. [36]

“Sec. 67-1102. Practice of medicine defined. A person shall be regarded as practicing medicine who shall, by any indication, or statement, claim his ability or willingness to, or does for hire diagnose, or prognosticate, any human ills, or claims his ability or willingness to, or does prescribe or administer any medicine, treatment or practice, or perform any operations, or manipulation, or application, for compensation therefor, except it be in usual business of opticians, or of vendors of dental or surgical instruments, apparatus and appliances. Practicing medicine shall include the practice of osteopathy.

“Sec. 67-1103. Certificates to practice - Requirements of applicants - Examination - Reciprocity certificates - fees. Three (3) forms of certificates shall be issued by said board, under the seal thereof and signed by the president and secretary; first, a certificate authorizing the holder thereof to practice

medicine and surgery; second, authorizing the practice of osteopathy; third, a reciprocity certificate. Any of these certificates, on being recorded in the office of the County Recorder, shall constitute the holder thereof a duly licensed practitioner in accordance with the provisions of his certificate. To procure a certificate to practice medicine and surgery, the applicant shall file with said board, at least two (2) weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character, and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting such diploma, not less than those prescribed by the association of American Medical Colleges for that year, or satisfactory evidence of having possessed such diploma, and he must also file a verified application, upon blanks furnished by the board, stating that he is the person named in such diploma, that he is the lawful holder thereof, and that the same was procured in the regular course of instruction and examination, without fraud or misrepresentation.

Applicants for a certificate to practice osteopathy shall be subject to the same regulations, except that instead of the diploma from a school of medicine, they shall file a diploma from a legally chartered college of osteopathy, having a course of instruction of at least twenty (20) months, requiring actual attendance of three (3) years of nine (9) months each, and including the studies examined upon for his license. Applicants for a certificate

to practice any other system or mode of treatment shall be subject to the above regulations, except that instead of the diplomas referred to, they shall file a diploma from a legally chartered college of the system or mode of treatment which the applicant claims or intends to follow.

The examination shall be conducted in the English language, shall be practical in character and in whole or in part, in writing, on the following subjects: Anatomy, histology, gynecology, pathology, bacteriology, chemistry and toxicology, physiology, obstetrics, general diagnosis, hygiene. Examination in each subject shall consist of not less than ten (10) questions, answers to which shall be marked upon a scale of zero to ten. [37] An applicant must obtain not less than a general average of seventy-five (75) percent, and not less than sixty (60) percent in any one (1) subject; provided that applicants who can show five (5) years of reputable practice shall be granted full credit, — (5) percent upon the general average, and five (5) percent additional for each subsequent ten (10) years of such practice, but must receive not less than fifty (50) percent upon any one (1) subject. The examination papers shall form a part of the records of the board and shall be kept on file by the secretary for one (1) year after such examination. In the examinations the applicants shall be known by numbers only, and the name attached to the numbers shall be kept secret until after the board has finally passed upon the application. The secretary

of the board shall not participate as an examiner in the examination.

Any applicant for a certificate to practice medicine and surgery shall be granted a reciprocity certificate without such examination if he shall file with said board the testimonials, diploma, and application; and shall file a certificate or license to practice medicine or surgery issued upon and after examination to said applicant by any other state or foreign country where the requirements are at least equal to those in force in Arizona at that time, or by the national board of medical examiners, and which certificates shall be accompanied by a further certificate, issued by the medical officer or board issuing the certificates or license first named, or by a certificate issued by the medical officer or board of the jurisdiction wherein the applicant last practiced, that the applicant at the time of issuance of said last named certificates, was an ethical practitioner and has practiced medicine and surgery for at least three (3) years immediately prior to the issuance of said certificate; an applicant for a reciprocity certificate or license who shall otherwise comply with the provisions hereof, and who shall file with said board evidence of an honorable discharge from the medical corps of the army or navy of the United States, shall not be required to furnish character testimonials or file the certificate of ethical practice for said three (3) years. The fee for reciprocity certificates shall be one hundred dollars (\$100.00); if the credentials are held insuf-

ficient, seventy-five dollars (\$75.00) thereof shall be returned.

The board may, whenever the services of an applicant are needed as an emergency in any community, grant to a graduate of any recognized medical college, a temporary permit to be valid only until the next regular meeting of the board. The fee for such temporary permit shall be twenty-five dollars (\$25.00).

Sec. 67-1104. Fee - Records. Each applicant, on making application, shall pay a fee of twenty-five (\$25.00) dollars, fifteen dollars (\$15.00) of which shall be returned if the applicant's credentials are insufficient, or he does not desire to take the examination. The board shall keep a record of all of its proceedings, a register of all applicants and the result of each examination". [38]

IV.

That said laws of 1936, in substance, provide that anyone, to qualify for examination to practice medicine and surgery, "shall file with the board, at least two weeks prior to a regular meeting thereof, satisfactory testimonials of good moral character and a diploma issued by some legally chartered school of medicine, the requirements of which shall have been, at the time of granting such diploma, not less than those prescribed by the Association of American Medical Colleges for that year." In this regard, plaintiff avers that the Association of American Medical Colleges is not a legal or proper authority to prescribe the qualifications for the

medical professor or for the practioners of medicine and surgery, and, therefore, such requirements and prescibed qualifications ae unconstitutional and void as a delagation of legislative power; that the law-makers of Arizona alone may prescribe the qualifications for the practice of medicine and surgery within the State of Arizona.

That the requirements for and during the year 1927, by the afore-mentioned American Academy of Medicine and Surgery, were equal to or not less than those of the association of American Medical Colleges for and during that year, to the actual knowledge of the defendants and each of them individually.

V.

That the Association of American Medical Colleges is sponsored by the American Medical Association, of which the defendants are members, except the defendant, Charles C. Bradbury; that the defendants by reason of their said membership and its rules and prescriptions by its legislative committee did, and do, in fact prescribe the qualifications for applicants for license to practice medicine and surgery in the state of Arizona, contrary [39] to law, arbitrarily, unlawfully and discriminatory to qualified applicants, including the plaintiff.

That both the American Medical Association and the Association of American Medical Colleges are monopolistic and act in violation of Section 2, Title 15 of the Laws of the United States, and in violation of Section 74-101 of the laws of the State of

Arizona; both of which said provisions of law prohibit trusts and monopolies.

VI.

That the plaintiff has heretofore offered and tendered for filing, satisfactory testimonials as to his good moral character and has tendered his diploma aforementioned, and the required fee provided by law, and has, in fact, complied with all legal requirements prescribed by the laws of Arizona; that the defendants and each of them individually, all of whom are licensed physicians and surgeons except the defendant Charles C. Bradbury, who is a licensed osteopathic physician, did, wilfully and maliciously, and well knowing that plaintiff was and is in every respect qualified to have issued to him a license to practice medicine and surgery in Arizona, and for other personal reasons best known to each of them, and because of envy, bias and prejudice toward him, and in fear of his competition and qualifications in the methods and practice of the healing arts, have refused to accept his credentials and to issue him a license to practice medicine and surgery in Arizona, and have also refused to give him an examination; all with knowledge that their acts and conduct herein complained of are wrongful, unlawful and unconstitutional.

VII.

That by the acts of each of the defendants, as herein charged, the plaintiff has been denied the benefits and rights granted him under and by the

provision of the Fourteenth Amendment to the Constitution of the United States, namely: [40]

“Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”.

VIII.

That all the defendants, except Charles C. Bradbury, are members of the Maricopa County Medical Association, and of the Medical Association of the State of Arizona, and of the American Medical Association, all of whom work in close cooperation and maintain the same standards, rules and requirements, through their legislative committees, in regard to the examining and licensing of applicants for the practice of medicine and surgery in Arizona; and that the Association of American Medical Colleges is sponsored and supported by the aforesaid American Medical Association, but that both the American Medical Association and the association of American Medical Colleges are monopolistic and in fact a trust and are engaged in interstate traffic and monopoly in violation of Section 2, Title 15 of the United States Laws, and in violation of Section 74-101 of the laws of Arizona,

in force and effect; all contrary to and in violation of this plaintiff's rights and benefits concerning which the defendants, personally and individually, have conspired with the officers of the American Medical Association, the Medical Association of Arizona and the Maricopa County Medical Association, in denying this plaintiff a license and his rights to practice medicine and surgery in Arizona, notwithstanding the fact that he has been, and is qualified and entitled thereto, to their knowledge.

IX.

That by the wilful, unlawful, and malicious acts and conduct of the defendants, personally and individually, as herein charged, the plaintiff has been deprived of his license to practice medicine [41] and surgery in Arizona continuously since 1933, and of his right to practice the healing arts incident thereto, resulting in great pecuniary losses to him and causing him to suffer humiliation and discredit as a physician and surgeon, all to his actual damages in the sum of Fifty Thousand Dollars (\$50,000.) and exemplary damages in the sum of Fifty Thousand Dollars (\$50,000.00).

The Plaintiff Demands judgment against the defendants and against each of them in the sum of \$100,000.00, and for costs of suit.

W. S. SWANK,

Plaintiff

By C. H. RICHESON,

His Attorney.

Received copy 3-20-43

C. A. EDWARDS

T. E. SCARBOROUGH

Attys for defts. [42]

EXHIBIT "A"

AMERICAN ACADEMY OF MEDICINE
AND SURGERY

Incorporated Under An Act of Congress

TO ALL TO WHOM THESE PRESENTS
SHALL COME

GREETING

Be it Known That

W. S. SWANK

Having completed in a satisfactory manner the
course of instruction and passed the required
examinations prescribed by this Academy, is
entitled to this

DIPLOMA

And we hereby confer upon him the degree
of

DOCTOR OF MEDICINE

By virtue of authority vested in the American
Academy of Medicine and Surgery by Con-
gressional Act.

IN WITNESS WHEREOF, we have affixed our
signature and the corporate seal of the American

Academy of Medicine and Surgery at Washington,
District of Columbia, this first day of June, 1927.

M. ERSKINE YUGIN, M.A., M.D.

President

CHAS. L. PICHEL, M.B., Litt.D.

Vice President.

RICHARD R. SCHLEUSNER,
M.A., M.D.

Dean

JOHN PARSONS FIELD,
M.A., M.D.

[Seal] Secretary [43]

[Endorsed]: Filed Mar. 20, 1943. [44]

In the United States District Court for the
District of Arizona

April 1943 Term

At Phoenix

Minute Entry of Monday, April 5, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

[Title of Cause.]

ORDER TAKING UNDER ADVISEMENT
MOTION TO DISMISS

Motion of defendants J. H. Patterson, E. J. Gott-
helf, Charles S. Smith, and Charles C. Bradbury
to Dismiss and Plaintiff's Application for Order
Removing Cecil A. Edwards, Assistant Attorney

General, as Counsel for defendants, come on regularly for hearing this day.

C. H. Richeson, Esquire, appears as counsel for the plaintiff. T. E. Scarborough, Esquire, appears as counsel for the defendants.

Argument is now had by respective counsel, and

It Is Ordered that said Motion to Dismiss and said Application for Order Removing Cecil A. Edwards, Assistant Attorney General, as Counsel for defendants be submitted and by the Court taken under advisement. [45]

In the United States District Court for the
District of Arizona

April 1943 Term

At Phoenix

Minute Entry of Tuesday, April 27, 1943
(Phoenix Division)

Honorable Dave W. Ling, United States District
Judge, Presiding.

CIV-359

W. S. SWANK,

Plaintiff,

vs.

J. H. PATTERSON, et al,

Defendants.

ORDER DISMISSING CASE

It Is Ordered that this case be dismissed for the reason that the complaint does not state a cause of action. [46]

[Title of District Court and Cause.]

NOTICE OF APPEALS TO THE NINTH
CIRCUIT COURT OF APPEALS

To the Honorable David W. Ling,

Judge of the Above Entitled Court:

Notice is hereby given that W. S. Swank plaintiff above named, hereby appeal to the Circuit Court of Appeals for the ninth circuit from the order dismissing for the reason that the complaint did not state a cause of action; entered in this action on April 27, 1943.

C. H. RICHESON

Attorney for Appellant

W. S. Swank

Copy Received April 30, 1943.

T. E. SCARBOROUGH

CECIL EDWARDS

Atty's for defts.

[Endorsed]: Filed Apr. 30, 1943. [47]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. Civ. 359 Phx.

W. S. SWANK,

Plaintiff-appellee,

vs.

J. H. PATTERSON, E. J. GOTTHELF,
CHARLES S. SMITH, CHARLES C.
BRADBURY and WILLIAM G. SCHULTZ,
Defendants.

PLAINTIFF-APPELLANT'S STATEMENT
OF POINTS

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit.

You are hereby notified that the plaintiff-appellant intends to rely in this appeal on the following points:

The District Court erred in—

I.

Overruling plaintiff's application to set order aside extending time to answer and Motion for Default on the original complaint filed herein.

II.

That the Court erred in refusing to remove Cecil A. Edwards as Assistant Attorney General as counsel for the defendants in this cause.

III.

In entering an Order dismissing the second Amended Complaint, because said Complaint did not state a cause of action.

C. H. RICHESON

Attorney for Plaintiff-
appellant.

5/10/43 Rec'd copy.

T. E. SCARBOROUGH

C. A. EDWARDS

Atty. for Defs.

By M. L. B.

[Endorsed]: Filed May 10, 1943. [48]

In the District Court of the United States in and
for the Federal District of Arizona

No. Civ. 359—Phoenix.

W. S. SWANK,

Plaintiff,

vs.

J. H. PATTERSON, E. J. GOTTHELF,
CHARLES S. SMITH, CHARLES C.
BRADBURY, and WILLIAM G. SCHULTZ,
Defendants.

BOND ON APPEAL

Know All Men By These Presents, That I, W. S. Swank, as principal, acknowledge myself firmly

bound unto J. H. Patterson, E. J. Gotthelf, Charles S. Smith, Charles C. Bradbury, and William G. Schultz, defendants, in this sum of Two Hundred Fifty (\$250) Dollars, which has been paid in to this Court in cash, conditioned that I shall pay or cause to be paid to said defendants all sums of money, costs, and damage whatsoever as costs in this action pending on appeal to the Ninth Circuit Court of Appeals of the United States, conditioned that said appeal shall be prosecuted to effect, resulting in an adverse decision to me as plaintiff.

Dated, Phoenix, Arizona, this the 3rd day of May, A. D. 1943.

W. S. SWANK

State of Arizona,
County of Maricopa—ss.

This instrument was acknowledged before me by W. S. Swank this the 3rd day of May, A. D. 1943.

My commission expires 8-24-43.

[Seal]

HORTENSE ANDERSON

Notary Public

[Endorsed]: Filed May 3, 1943. [49]

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. Civ.-359 Phx.

W. S. SWANK,

Plaintiff,

vs.

J. H. PATTERSON, E. J. GOTTHELF,
CHARLES S. SMITH, CHARLES C.
BRADBURY, and WILLIAM G. SCHULTZ,
Defendants.

PLAINTIFF - APPELLANT'S DESIGNATION
OF CONTENTS OF RECORD ON APPEAL

To the Clerk of the United States Circuit Court of
Appeals for the Ninth District.

You are hereby requested to include in the record
on appeal herein—

- (1) The original complaint filed herein.
- (2) Application to set order aside extending time
to answer, and Motion for Default.
- (3) Application for Order removing Cecil A. Ed-
wards, Assistant Attorney General of the State of
Arizona as counsel for the defendants.
- (4) Second amended complaint filed herein.
- (5) Order of the Court extending time to answer.
- (6) Order of the Court refusing Application to
set Order aside extending time to answer a Motion
for Default.
- (7) Defendants Motion to Dismiss.
- (8) Order dismissing second amended complaint

because said complaint did not state a cause of action.

(9) Plaintiff Appellants statement of points.

(10) This designation of the contents of the record on appeal.

(11) Plaintiff's Bond on Appeal. [50]

This transcript is to be prepared as required by law and the rules of this Court and the rules of the Circuit Court of Appeals for the Ninth Circuit, and is to be filed in the office of the said Court of Appeals at San Francisco, California.

Dated this 10th day of May, 1943.

C. H. RICHESON

Attorney for plaintiff-
appellant.

5/10/43 Rec'd copy

T. E. SCARBOROUGH

C. A. EDWARDS

By M. D. B.

[Endorsed]: Filed May 10, 1943. [51]

In the United States District Court for the
District of Arizona

CLERK'S CERTIFICATE TO TRANSCRIPT
OF RECORD

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United
States District Court for the District of Arizona,

do hereby certify that I am the custodian of the records, papers and files of said Court, including the records, papers and files in the case of W. S. Swank, Plaintiff, versus J. H. Patterson, E. J. Gotthelf, Charles S. Smith, Charles C. Bradbury, and William C. Schultz, Defendants, numbered Civ-359 Phoenix, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 51, inclusive, contain a full, true and correct transcript of the proceedings had in said cause, and of all the papers filed therein, together with the endorsements of filing thereon, called for and designated in Plaintiff-Appellant's Designation of Contents of Record on Appeal filed therein and made a part of the transcript attached hereto, as the same appear from the originals of record remaining on file in my office as such Clerk, in the City of Phoenix, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying this said transcript of record amounts to the sum of \$12.00, and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court this 24th day of May, 1943.

[Seal] EDWARD W. SCRUGGS,
Clerk

By WM. H. LOVELESS
Chief Deputy Clerk. [52]

[Endorsed]: No. 10,443. United States Circuit Court of Appeals for the Ninth Circuit. W. S. Swank, Appellant, vs. J. H. Patterson, E. J. Gott-helf, Charles S. Smith, Charles C. Bradbury and William G. Schultz, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed May 27, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Ap-
peals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10443

W. S. SWANK,

Plaintiff,

vs.

J. H. PATTERSON, E. J. GOTTHELF,
CHARLES S. SMITH, CHARLES C.
BRADBURY, and WILLIAM G. SCHULTZ,
Defendants.

PLAINTIFF-APPELLANT'S STATEMENT
OF POINTS

To the Clerk of the United States Circuit Court of
Appeals for the Ninth Circuit.

You are hereby notified that plaintiff-appellant adopts and here incorporates by reference as a statement of points on which it is intended to rely on appeal. The plaintiff-appellant's statement of

points appear in the Transcript of Record heretofore transmitted to this Court.

C. H. RICHESON

Attorney for plaintiff-
appellant.

5/10/42 Rec'd Copy.

T. E. SCARBOROUGH

C. A. EDWARDS

By M. D. BROWN

Atty. for Defs.

[Endorsed]: Filed May 27, 1943. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

PLAINTIFF - APPELLANT'S DESIGNATION
OF PRINTED RECORD

To the Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit.

You are hereby notified that the plaintiff-appellant designates for printing the entire Transcript of the record heretofore transmitted to this Court.

C. H. RICHESON

Attorney for plaintiff-
appellant.

5/10/43. Rec'd copy.

T. E. SCARBOROUGH

C. A. EDWARDS

Attys. for Defs.

By M. D. BROWN

[Endorsed]: Filed May 27, 1943. Paul P.
O'Brien, Clerk.

